

APPROVED

**VERMONT SUPREME COURT
ADVISORY COMMITTEE ON RULES OF PROBATE PROCEDURE
Minutes of Meeting
February 19, 2015**

The meeting was called to order at 1:40 p.m. in Room 216 Debevoise Hall, Vermont Law School, by Hon. Joanne M. Ertel, Chair. Present were Committee members Hon. Ernest T. Balivet, Molly Bucci, Judith Joly, Mark Langan (by phone), Hon. John Monette (by phone), Katherine Mosenthal (by phone), David Otterman, Dianne Pallmerine (by phone), Catherine Richmond, and Norman C. Smith. Also present were Hon. John A. Dooley, III, Supreme Court liaison, and Professor L. Kinvin Wroth, Reporter.

The Committee welcomed newly appointed members Hon. Ernest T. Balivet and Norman C. Smith

1. Approval of draft minutes of the meeting of December 8, 2014. On motion duly made and seconded, it was voted unanimously to approve the corrected draft minutes of the meeting of December 8, 2014.

2. Status of proposed and recommended amendments. Professor Wroth reported that:

A. The Committee's proposed amendments of V.R.P.P. 3(b)(2) and 7 and proposed new V.R.P.P. 80.4 were sent out for comment on December 15, 2014, with comments due on February 17, 2015. One comment received on V.R.P.P. 7 was deferred for consideration at the next meeting.

B. The Committee's recommended amendments of V.R.P.P. 3, 4, and 5, were sent to the Supreme Court on December 9, and promulgated December 11, 2014, effective February 13, 2015. The Committee considered Bob Pratt's e-mail of December 16 noting that the amendment of Rule 3(b)(2) established a procedure for opening an estate by consent that was more complicated than the procedure provided by 14 C.S.A. § 108. After discussion, Mr. Smith agreed to consider the interplay and possible conflicts among the new provisions and Rules 4 and 17(a)(1), (b), and (c) and provide a draft for the next meeting.

3. Proposed cost-saving legislation: Probate appeals. Justice Dooley explained that the Supreme Court's proposed "lightening the load" bill would provide for direct appeals from the Probate Division to the Supreme Court on the record. It sought to balance an increased Civil Division caseload resulting from judicial vacancies with a decline in the Supreme Court's caseload as part of a general shift of the Civil Division's present appellate caseload to the Supreme Court. There was an annual total of about 150 appeals to the Civil Division from all sources, of which 25 were probate appeals. In discussion, Committee members noted that the shift to appeal on the record would require judicial training and better recording equipment and lead to more formality and greater presence of lawyers in the probate court. It was suggested that the Administrative Procedure Act could provide a model for a

simpler process for probate appeals or that perhaps a two-track system could be developed to allow uncontested matters to be dealt with expeditiously. It was suggested that there was a constitutional right to a jury in a contested case that would be lost by the elimination of de novo appeals. Concerns were expressed that, if a record had to be made in probate court, beneficiaries who could not afford counsel would not be heard and the greater complexity, which necessarily would involve more lawyers would slow the process.

It was agreed that the Committee would take no formal Committee position on the proposal but that individual members could express their concerns to Justice Dooley or to legislators when the bill was introduced.

4. Expanded provisions for motions and contested cases. The Committee briefly reviewed Professor Wroth's revised draft of proposed new V.R.P.P. 39, dated December 1, 2014, and his draft of proposed amendments to V.R.C.P. 72, dated December 8, 2014, as well as Mr. Otterman's e-mail of November 17, 2014, proposing clarification of the procedures for interlocutory appeals from the Probate Division to the Civil Division, as considered at the December 8 meeting. Ms. Pallmerine and Judge Balivet agreed to serve as a subcommittee to consider and report on development of these drafts as an alternative to the Court's proposed legislation.

5. Effect of recommended amendment of V.R.F.P. 7 and addition of V.R.F.P. 7.1 on probate jurisdiction under V.R.F.P. 6, 6.1. Professor Wroth reported that the Family Rules Committee had designated Judges Gerety and Scanlan, Christine Speidel of Vermont Legal Aid, and Jody Racht, Family Rules Committee chair, to serve on the joint subcommittee to address Act 170 of 2013 (Adj. Sess.) and common issues pertaining to V.R.F.P. 6, 6.1, 7, and 7.1. Judges Ertel and Balivet agreed to serve on the joint subcommittee.

6. Proposed Amendment of V.R.P.P. 43(e)—Appointment of Interpreters—to Conform to Current Policy. Professor Wroth reported that there had been no activity on the Civil Rules Committee's proposed amendment of V.R.C.P. 43(f) to satisfy federal standards for interpreters since his report at the December 8 meeting.

7. Status of children as parties under V.R.P.P. 17(a)(1) in light of 14 V.S.A. § 311. Mr. Smith agreed to consider this issue and the relevant forms as part of his review of Rue 17(a)(1) undertaken under item 2.B above.

8. Probate Rules amendment to conform to Act 96 of 2013, "Respectful Language Act." Professor Wroth will report on the status of the statutory revisions required by Act 96 at the next meeting.

9. VR.P.P. 77(c). Proposed amendment to conform to statutory change concerning duties of register. On motion duly made and seconded, the Committee voted unanimously to recommend that Professor Wroth's February 17 draft amendment be sent out for comment.

10. V.R.P.P. 47. Proposal to require recording of all probate proceedings. The Committee considered Judge Ertel's concern that, although most probate courts record all proceedings, V.R.P.P.

47 requires recording only for certain limited proceedings. The Committee agreed that requiring probate courts to record all proceedings would bring uniformity to the courts. Professor Wroth agreed to prepare a draft for the next meeting that would require every proceeding to be recorded except adoption finalizations, uncontested name changes, and uncontested vital records cases, provided that the court shall require recording of any proceeding on request of a party and may require it on the court's own initiative.

11. Other Business. There was no other business

12. Date of next meeting. Professor Wroth agreed to circulate dates for a meeting to be held in at 1:30 p.m. at Vermont Law School in the week of April 27.

There being no other business, the meeting was adjourned at 3:50 p.m.

Respectfully submitted,

L. Kinvin Wroth, Reporter